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To be argued by
IRVING ANOLIK

In The

Supreme Court of the United States

October Term 1972

No. 71-1043

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals, State of New York
Petition for Certiorari filed March 1, 1972
Certiorari granted May 15, 1972

BRIEF FOR PETITIONER

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TABLE OF CONTENTS.

Page

1 . . . . . .

2 . . . . . .

3 . . . . . .

3 . . . . . .

4 . . . . . .

TABLE OF CONTENTS

	Page
Statement	1
Opinions Below	2
Jurisdiction	2
The Questions Presented for Review	2
Constitutional and Statutes Involved	3
The Facts	4
Argument:	
Point I. The United States Court of Appeals for the Second Circuit expressly declared that no movie film could be seized without affording a prior adversary hearing. Despite this explicit injunction, the New York Court of Appeals nevertheless upheld a seizure effected sans a prior adversary hearing. This violated the supremacy clause of the Constitution as well as the First and Fourth Amendments.	6
Point II. A prior adversary hearing involving First Amendment rights such as a moving picture film is not a question of discretion, but is a matter of fundamental constitutional rights. The petitioner herein was entitled, as a matter of constitutional law, to	

Contents

Page

a prior adversary hearing before the seizure of "Blue Movie" was effectuated. 10

Point III. The seizure and suppression of the motion picture film herein without a prior adversary hearing to determine its alleged obscenity, constituted a prior restraint on the exercise of freedom of expression in violation of the First, Fourth and Fourteenth Amendments and of decisional law interpretive thereof. 12

Point IV. The film in question, "Blue Movie," is not obscene and should not have been banned since there was no claim of "pandering" or "exploitation of its sexual content." 19

Conclusion 21

Table of Citations

CASES CITED:

Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970) 3, 7, 8

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 14

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. denied 397 U.S. 920 . . . . . 3, 7, 8, 16, 17, 18, 19

Contents

	Page
Boddie v. Connecticut, 91 S. Ct. 780, 785-786	14
Cain v. Kentucky, 397 U.S. 319	20
Cambist Films, Inc. v. Duggan, 420 F.2d 687 (3 Cir. 1969)	16
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175	14
Castle v. Hayes Freight, (1954), 3484 S. 61, 99 L. Ed. 68	8
Demich, Inc. v. Ferdon, 426 F.2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223	16
Freedman v. Maryland, 380 U.S. 51, 57	14
Gibbons v. Ogden (1824), 9 Wheat. 1, 6 L. Ed. 23	8
Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D. N.Y. 1969)	19
Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed.2d 1469 (1957)	19
Lee v. Florida, 392 U.S. 378	9
Mapp v. Ohio, 367 U.S. 643	9
Marcus v. Search Warrants of Property, 367 U.S. 717, 731, 736	12, 15

Contents

	Page
McDermott v. Wisconsin (1913) 228 U.S. 115, 132, 57 L. Ed. 754	8
Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968)	16, 18
Miranda v. Arizona, 384 U.S. 436	9
New York Times Co. v. United States, 91 S. Ct. 2140, 2143	13
Quantity of Copies of Books v. Kansas, 378 U.S. 205	16
Rabe v. Washington, (No. 71-247, October Term, 1971)	11
Redrup v. New York, 386 U.S. 767	20
Roth v. United States, 354 U.S. 476	3
Sniadach v. Family Finance Corp., 395 U.S. 337	13
Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969)	19
Speiser v. Randall, 357 U.S. 513, 525	12
Stanley v. Georgia, 394 U.S. 557	21
208 Cinema, Inc. v. Vergari, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ___ F.2d ___ (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934	16

Contents

Page

Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985 . . . . . 16, 18

United States v. Alexander, 428 F.2d 1169, 1176 (8 Cir. 1970) 16, 18

Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied sub nom. Turner v. Wilhelm, 91 S. Ct. 919 (March 1, 1971) 16

UNITED STATES CONSTITUTION CITED:

Art. VI, par. 2 . . . . . 3, 8

First Amendment 3, 11, 14, 15, 21

Fourth Amendment 3, 11, 21

Fourteenth Amendment 3, 11, 15, 21

STATUTES CITED:

28 U.S.C., Sec. 1257(3) 2

New York Penal Law 8235.05 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972
NO. 71-1043

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SAUL HELLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- -x

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK. PETITION FOR CERTIORARI FILED MARCH 1, 1972. PETITION FOR CERTIORARI GRANTED MAY 15, 1972.

Statement

Petitioner, Saul Heller, submits this brief in connection with the Writ of Certiorari which was granted by this Court on the 15th day of May, 1972. The petitioner is seeking a reversal of a judgment of conviction charging him with violating Section 235.05 of the New York Penal Law (obscenity in the portrayal of a motion picture — "Blue Movie").

Statement

The petitioner herein is an attorney at law and was sentenced to pay a fine of $250.00 or to serve 30 days in jail. The fine has been paid (162a).

Opinions Below

The Appellate Term of the Supreme Court of the State of New York affirmed the judgment of conviction, one Judge dissenting in an opinion. That opinion is reproduced at page 179a of the Appendix. The New York Court of Appeals likewise affirmed the judgment of conviction with two judges dissenting and that opinion appears at 181a of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3).

The Questions Presented for Review

1. Whether a movie film may ever be seized without a prior adversary hearing?

2. Whether a State Court (New York Court of Appeals) may blatantly disobey a ruling of the United States Court of Appeals by refusing to order an adversary hearing prior to the seizure of a movie film, in view of the determination by the United States Court of Appeals, Second Circuit, that such an adversary hearing is required?

The Questions Presented for Review

3. A movie film entitled "Blue Movie," restricted to audiences over the age of 18 years, was seized without a prior adversary hearing having been afforded to the petitioner. Since the United States Court of Appeals for the Second Circuit ruled that a prior adversary hearing must be granted in such cases, did the New York Court of Appeals violate the supremacy clause of the United States Constitution, as well as the First and Fourteenth Amendments thereof, by holding that the courts of the State of New York need not grant prior adversary hearings in such cases? (Bethview Amusement Corp. v. Cahn, 416 F.2d 410 [1969], cert. denied 397 U.S. 920; Astro Cinema Corp. v. Mackell, 422 F.2d 293 [1970]).

4. Whether the film here in question, "Blue Movie," was in fact obscene within the purview of Roth v. United States, 354 U.S. 476, in view of the facts that there was no pandering or solicitation, and no one under the age of 18 was permitted to buy a ticket or to see the film?

Constitutional and Statutes Involved

The First, Fourth and Fourteenth Amendments and Article VI, paragraph 2 of the Constitution, as well as N.Y. Penal Law 8235.05 are involved.

The Facts

The factual situation is not of paramount importance. The petitioner was manager of the Garrick Theatre on Bleeker Street in Greenwich Village which, on July 29, 1969, was showing a movie called "A Blue Movie." There is no doubt but that absolutely no one under the age of 18 years was permitted into the theatre and that there was no pandering or solicitation for patrons to enter the theatre.

On July 31, 1969, a criminal court judge, Honorable Arthur H. Goldberg, at the request of Assistant District Attorney Beckler, went to this theatre and viewed the movie between 3:40 p.m. and 5:20 p.m.

This viewing was precipitated by an earlier attendance at the theatre by two police officers on July 29, 1969, namely Deputy Inspector Charles Smyth and Lieutenant Sullivan (Smyth, 20a-26a, 33a; Goldberg, 10-17a).*

Immediately after the showing of the movie, without any notice to the petitioner, and without any adversary hearing, the Judge signed a search warrant right outside of the theatre ordering the seizure of the film and also executed three arrest warrants because

*Numerals in parentheses refer to pages of the Appendix.

The Facts·

"It was and is my opinion that that film is obscene, and was obscene as I saw it under the definition" (Goldberg, 10a-13a, 16a-17a).

"Blue Movie" consists of three reels of color film which run for over one hour and forty-five minutes, excluding interruptions. All of the judges in the courts below viewed the film and, in each instance, the movie was ruled obscene although there were dissents, namely two judges, including the Chief Judge and an associate judge, in the Court of Appeals, and one justice in the Appellate Term of the Supreme Court.

It is not relevant to this petition to go into all of the facts beyond this since this recitation crystallizes the issues. There were differences of opinion as to whether or not the movie was or was not obscene. This is one major issue raised in this Court. Perhaps a more important issue, however, is whether or not an adversary hearing should have been held prior to the issuance of the search warrant since there was no emergency nor was there any danger to the community. A seizure of this film effectively precluded further showings since there were no other prints readily available, and the threat of imminent arrest lurked in prospect for any personnel causing a display of the film.

THE ISSUE OF UNLAWFUL SEARCH AND SEIZURE IS PROPERLY BEFORE THIS COURT.

The Facts

The respondent has previously conceded that the petitioner properly preserved the issue of unlawful search and seizure and was anxious for the return of the film which had been seized. The respondent, in the Court below, in its brief on page 20, admitted:

> "It appears therefore that in the unusual circumstances here, the issue of the seizure was preserved for review."

In this Court, respondent consented to Certiorari.

There is, therefore, no dispute between the parties hereto about the jurisdiction of this Court to review the issues being raised, namely whether or not a seizure of the film was justified without an adversary hearing having been held, and whether or not the prosecution was justified in retaining the film, as it still does.

Argument

Point I

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT EXPRESSLY DECLARED THAT NO MOVIE FILM COULD BE SEIZED WITHOUT AFFORDING A PRIOR ADVERSARY HEARING. DESPITE THIS EXPLICIT INJUNCTION, THE NEW YORK COURT OF APPEALS NEVERTHELESS UPHELD A SEIZURE EFFECTED SANS A PRIOR ADVERSARY HEAR-

ING. THIS VIOLATED THE SUPREMACY CLAUSE OF THE CONSTITUTION AS WELL AS THE FIRST AND FOURTH AMENDMENTS.

In the case at bar there is no serious dispute concerning the facts. There is no question but that the movie in question herein, "Blue Movie," was seized by the State authorities without affording the petitioner or the owner of the film, or anyone else for that matter, a prior adversary hearing. A judge, Honorable Arthur Goldberg of the Criminal Court of the City of New York, viewed the film and made an ex parte determination that it was obscene. Predicated upon this, he signed a search warrant authorizing the seizure of the film which turned out to be one of the few, if not the only, prints available. He also ordered the forthwith arrest of petitioner.

As explained earlier in this brief, the respondent concedes that the issue of search and seizure is properly before this Tribunal.

The Courts in New York were told about the decisions of the United States Court of Appeals on the issue of affording prior adversary hearings in cases similar to that presented herein. It can only be presumed therefore that the Courts of New York State deliberately and intentionally chose to violate the ruling of the United States Court of Appeals for the Second Circuit (Bethview Amusement Corp. v. Cahn, supra; Astro Cinema Corp. v. Mackell, supra (172a, 173a).

Argument

It is submitted that this squarely presented an issue affecting the supremacy clause of the Constitution of the United States. (Gibbons v. Ogden [1824] 9 Wheat. 1, 6 L. Ed. 23; McDermott v. Wisconsin [1913] 228 U.S. 115, 132, 57 L. Ed. 754; Castle v. Hayes Freight, [1954] 3484 S. 61, 99 L. Ed. 68.) Presumably, Federal law and decisions interpreting Federal Law constitute the supreme law of the land. This factor was obviously of no moment to any of the courts in New York.

In both the Astro Cinema Corp. and the Bethview cases, the Second Circuit specifically declared that adversary hearings were required before warrants could be issued for the seizure of a movie film.

In rejecting this view, the New York Court of Appeals' majority declared, inter alia:

> "...The decisions of the Second Circuit in Astro Cinema Corp. v. Mackell ... and Bethview Amusement Corp. v. Cahn ..., requiring adversary hearings before warrants are issued, go beyond any requirement imposed on State courts by the Supreme Court."

The supremacy clause of the United States Constitution, Article VI, paragraph 2, requires that State courts defer to Federal courts in such conflicts (Gibbons v. Ogden, supra.)

The Constitution of the United States, Article VI, paragraph 2, unequivocally declares:

Argument

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Emphasis supplied.)

In such other cases as Mapp v. Ohio, 367 U.S. 643 and Miranda v. Arizona, 384 U.S. 436, this Court has pre-empted State courts' decisions in the area of search and seizure and confessions respectively, and has directed that where inconsistent with the determinations of this Court, the State courts must change their determinations. This is also exemplified by the decision in Lee v. Florida, 392 U.S. 378.

The issue, therefore, in the case at bar, is very clearly framed since it is manifest that where the State of New York's highest Court deliberately refuses to obey a determination of the United States Court of Appeals, that a serious jurisdictional conflict is presented which should be resolved by this Court. This is especially so where the State's highest Court declares that it is obeying the policies of the United States Supreme Court in its refusal to obey the determinations of the United States Court of Appeals.

If this Court fails to resolve this conflict, litigants will obtain one result in the Federal Court of Appeals, but a different result in the

New York State courts. This would be an intolerable situation.

It is respectfully submitted that the United States Court of Appeals is correct and that the First Amendment as well as the Fourteenth Amendment requires that prior adversary hearings be granted before a movie film is seized.

In the case at bar, the seizure of the film effectively precluded the showing of the movie since there was no other print readily available (158a, 159a).

Even if that were not the case, however, the risk of criminal prosecution and further seizure would be adequate deterrents. In addition, the petitioner, as well as the owners of the film, have suffered tremendous economic loss.

We submit that the respondent is probably just as anxious to resolve this dilemma.

Point II

A PRIOR ADVERSARY HEARING INVOLVING FIRST AMENDMENT RIGHTS SUCH AS A MOVING PICTURE FILM IS NOT A QUESTION OF DISCRETION, BUT IS A MATTER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS. THE PETITIONER HEREIN WAS ENTITLED, AS A MATTER OF CONSTITUTIONAL LAW, TO A PRIOR ADVERSARY HEARING BEFORE THE SEIZURE OF "BLUE MOVIE" WAS EFFECTUATED.

Argument

This Court has not specifically passed upon the issue herein, but it is submitted that the inescapable conclusion that one must reach is that the First, Fourth and Fourteenth Amendments prohibited the seizure of a movie film without affording a prior adversary hearing.

There can be no doubt that the movie film herein was displayed in a theatre which was completely enclosed and the film could not be viewed by any member of the public unless a ticket was purchased at a substantial price and entry was thus obtained to the auditorium. Accordingly, the unusual situation presented in Rabe v. Washington, (No. 71-247, October Term 1971), is not extant herein. It is not disputed that no one under the age of 18 years was permitted to purchase a ticket and there was no pandering or solicitation of the public whereby anyone was enticed or proselytized into buying a ticket to see the movie.

Judge Goldberg of the Criminal Court of the City of New York apparently viewed this film but his testimony indicated that he was not particularly excited. On the contrary, he was bored by it. He came to view the film in the role of a censor, and immediately after seeing it, signed a search warrant authorizing the seizure of the film.

The petitioner was likewise arrested in this summary fashion, on the same day as the seizure.

Argument

The courts in New York were split on the issue of whether or not the film was or was not obscene although the majority in each instance ruled in favor of a finding of obscenity. We of course do not believe the film is obscene at all although this aspect is discussed infra.

Point III

THE SEIZURE AND SUPPRESSION OF THE MOTION PICTURE FILM HEREIN WITHOUT A PRIOR ADVERSARY HEARING TO DETERMINE ITS ALLEGED OBSCENITY, CONSTITUTED A PRIOR RESTRAINT ON THE EXERCISE OF FREEDOM OF EXPRESSION IN VIOLATION OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS AND OF DECISIONAL LAW INTERPRETIVE THEREOF.

The guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. The Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. Marcus v. Search Warrants of Property, 367 U.S. 717, 731; Speiser v. Randall, 357 U.S. 513, 525.

Argument

It is submitted that one of the fundamental precepts of due process is that an individual is guaranteed a right to notice and hearing before he may be deprived of any significant property interest. Ex parte restraints are particularly abominable. While a motion picture film may not appeal to everybody, it is nevertheless clear that it is a means of communication and a form of expression within the purview of the First Amendment. All media of communication must be left free if we are to have a free press and free speech in this nation. There must be no censorship, injunctions, or prior restraints upon the media of communication. (See Justice Black concurring in New York Times Co. v. United States, 91 S. Ct. 2140, 2143.)

It is generally accepted as fundamental to procedural due process that a person be afforded "notice and an opportunity to be heard" before he may be deprived of life, liberty or property. The mainstream of the procedural due process decisions of the courts is the recognition that the most fundamental ingredient of the due process guarantee is "a meaningful opportunity to be heard." Thus, while it is customary today to begin discussion of this principle with Sniadach v. Family Finance Corp., 395 U.S. 337, it is important to emphasize that the Sniadach opinion did not establish a new constitutional rule, but simply brought traditional procedural due process analysis, worked out over many decades of constitutional litigation, to bear upon the question at issue in the case. "Early in our jurisprudence" it was held that

"due process of law signifies a right to be heard in one's defense" Boddie v. Connecticut, 91 S. Ct. 780, 785-786.

More than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case, the public's right to know, the public's right to hear, the public's right to view, is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected.

It follows therefore that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70; Freedman v. Maryland, 380 U.S. 51, 57. Thus, in Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, the Court held that the issuance of a ten day injunction restraining members of a political party from holding rallies was incompatible with the freedom of speech provisions of the First Amendment. The Court stated that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate" 393 U.S. at 180. The Court added the following salient observations:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte,

because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication" 393 U.S. at 183.

With respect to the ex parte seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed, have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression, without a prior adversary hearing to determine the alleged obscenity of the particular communication seized, constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First and Fourteenth Amendments. In Marcus v. Search Warrants of Property, 367 U.S. 717, 736, the Court observed that no prior decision of the

Court supported the proposition that a State could impose extensive restraints on the distribution of publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material was legally obscene. In Quantity of Copies of Books v. Kansas, 378 U.S. 205, the Court concluded "that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient" 378 U.S. at 211.

The Books ruling was followed in Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; 208 Cinema, Inc. v. Vergari, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ___ F.2d ___ (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934; United States v. Alexander, 428 F.2d 1169 (8 Cir. 1970); Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied sub nom. Turner v. Wilhelm, 91 S. Ct. 919 (March 1, 1971); Cambist Films, Inc. v. Duggan, 420 F.2d 687 (3 Cir. 1969); Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Demich, Inc. v. Ferdon, 426 F.2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

At least six courts of appeals as aforestated, and many district courts, have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed access to non-obscene expression. A distillation of the views expressed by the courts indicates a

firm belief that a prior adversary hearing, rather than an ex parte proceeding, is essential in cases involving alleged obscenity. An adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and makes certain that seizure or injunction will be limited only to those items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

The First Amendment does not require that an adversary hearing turn on the question of whether there has been a "massive" seizure of allegedly obscene material. Certainly a theatre housing 200 seats, such as in the cast at bar, where one of the detectives (Smyth) declared that on at least two occasions 100 of those seats were filled during the screening of the film, a great potential audience exists who may ultimately view the movie. To equate a print of a film with a single book, therefore, would be ludicrous.

In Bethview Amusement Corp., supra, the Court of Appeals made it quite plain that the seizure of a film is far more significant than the seizure of a single book. Thus the Court explained:

"Appellants argue that there is a difference between the seizure of a large number of

books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated" (Bethview, supra, 416 F.2d at 412).

In United States v. Alexander, 428 F.2d 1169 (8 Cir. 1970), the Court of Appeals declared that it is a casuistic line of reasoning to argue that purveyors or dealers in obscenity will be immunized from prosecution if prior adversary hearings are required. Thus in United States v. Alexander, supra, (id. at 1176), the Court explained:

"It is frequently suggested, and the Government so argues, that dealers in obscenity will be effectively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for the securing of evidence remain available to prosecutors. See, e.g., Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Tyrone, Inc. v. Wilkinson,

410 F.2d 639 (4th Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969); Gregory v. DiFlorio, 298 F. Supp. 1360 (W.D. N.Y. 1969). See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed.2d 1469 (1957). We believe these cases answer the Government's concern."

Point IV

THE FILM IN QUESTION, "BLUE MOVIE," IS NOT OBSCENE AND SHOULD NOT HAVE BEEN BANNED SINCE THERE WAS NO CLAIM OF "PANDERING" OR "EXPLOITATION OF ITS SEXUAL CONTENT."

In the Appellate Term of the Supreme Court of the State of New York, Justice Markowitz dissented and voted to reverse the judgment of conviction on the grounds that the film was not obscene and because of his very incisive recognition that "sex and obscenity are not synonymous" (179a).

He further recognized, as have many other courts, that there are very dim and uncertain lines between what one person may consider obscene, and what another may consider obscene.

Even in the case at bar, the presiding Judge at the trial indicated how vague and nebulous the theory of obscenity really is (33a):

Argument

"The Presiding Judge: Yes. I might point out to you, Counselor, that there is a wide diversity of opinion throughout the country, including the federal courts, on this very issue. Now, there are some cases that have held that it is part of the People's case to establish what the so-called [41] community standards are. There are other cases which hold that that is not a part of the People's case. There are some cases that hold that expert testimony as to what community standards are, should be introduced. There are other cases that hold to the contrary.

The Defendant's Counsel: Agreed, Your Honor.

The Presiding Judge: And even Redrup, which you cite as a leading case, the judges split four different ways, they couldn't agree on an opinion, all they could agree was that the case should be reversed."

The dissent of Chief Judge Fuld of the New York Court of Appeals in which another judge concurred, indicated that he, too, found that the movie was not obscene (185a, 186a).

(See Cain v. Kentucky, 397 U.S. 319; and, Redrup v. New York, 386 U.S. 767.)

The movie does not show any perverted acts of contacts between the actors and there are numerous films now being shown which are far more explicit than anything shown in the "Blue Movie."

Argument

Since Stanley v. Georgia, 394 U.S. 557, prohibits seizure of any film used for private recreation of a non-commercial nature, we maintain that it is a logical next step to prohibit any seizure of a movie such as the one at bar which is not being pandered or exploited and which is not available to children or anyone else, except those willing to pay about $5 to see it. Why ought any adult be deprived of the right to see any form of entertainment which does not cause any clear and present danger to society?

The suppression of a movie such as the one herein, banal perhaps, but certainly not a threat to law and order, smacks of "thought control" and is a clear violation of the First, Fourth and Fourteenth Amendments. This Court should once and for all put an end to the selective suppression of material within the First Amendment's purview.

Conclusion

The Judgment of Conviction should be reversed and the information dismissed.

Respectfully submitted,

IRVING ANOLIK and
JOEL H. WEINBERG
Attorneys for Petitioner

IRVING ANOLIK
Of Counsel.